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No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF MANASSAS, VIRGINIA, *Et Al.*,

Appellants,

and

WILLIAM H. FORST,

Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does Virginia Code Ann. § 58.1-3502 (Repl. Vol. 1984) unconstitutionally discriminate against the United States and the contractors with whom It deals?

PARTIES BELOW

The appellant in the Court of Appeals for the Fourth Circuit was the United States of America. The appellees in the Court of Appeals for the Fourth Circuit were the City of Manassas, Virginia and Arthur L. Shoemake, Commissioner of Revenue of the City of Manassas. William H. Forst, State Tax Commissioner of the Commonwealth of Virginia, who intervened at the District Court level, was also an appellee in the Court of Appeals for the Fourth Circuit.

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CITY OF MANASSAS, VIRGINIA, *Et Al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order and Memorandum opinion of the United States District Court for the Eastern District of Virginia, dated January 30, 1986, is reported at 627 F. Supp. 645 and is reproduced in the Appellants' Appendix (App. B at A-12). The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, dated October 6, 1987, is reported at 830 F.2d 530 and is reproduced in the Appellants' Appendix. (App. A at A-1).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit held Va. Code Ann. § 58.1-3502 (Repl. Vol. 1984) repugnant to the United States Constitution in an Opinion dated October 6, 1987. The Court of Appeals' jurisdiction was assertedly based upon 28 U.S.C. § 1291. In holding Section 3502 to be unconstitutional, the Court of Appeals vacated the January 30, 1986 Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, upholding the constitutionality of Section 3502. The jurisdiction of the District Court was assertedly based upon 28 U.S.C. §§ 1331, 1345 and 2201.

Appellants filed the appropriate Notice of Appeal with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit on December 23, 1987. A Copy of said Notice is reproduced in Appellants' Appendix. (App. C at A-22).

The appellate jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(2), which provides for the direct appeal to this Court from a decision of a federal court of appeals holding a state's statute to be unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Court of Appeals for the Fourth Circuit, in its October 6, 1987 Opinion and Judgment, held Va. Code Ann. § 58.1-3502 to be repugnant to the Supremacy Clause of the United States Constitution. Article VI of the Constitution of the United States provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The relevant federal statutes are 28 U.S.C. §§ 1254(2), 1291, 1331, 1345 and 2201. These statutes are reproduced in the Appellants' Appendix (App. D at A-24, and A-25 respectively).

The relevant Virginia statute is Va. Code. Ann. § 58.1-3502, (formerly Va. Code Ann. § 58-831.2). This statute is reproduced in Appellants' Appendix. (App E at A-26).

STATEMENT OF THE CASE

Section 58.1-3502 of the Code of Virginia provides:

> Any person, firm, association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows, or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee was the owner thereof. This Section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (Section 15.1-1342 *et seq.*) and leased to provide transportation services.

The City of Manassas collected a tax from International Business Machine Corporation (IBM) for the tax years 1981, 1982, 1983, and 1984 pursuant to the provisions of

Section 58.1-3502 (formerly Section 58-831.2). IBM paid said tax under protest for the above-enumerated tax years. Pursuant to various cost-plus fee contracts entered into between IBM and the Defense Logistics Agency (Department of Defense), IBM was reimbursed by the United States for the entire amount of money remitted to the City of Manassas pursuant to Section 58.1-3502 (formerly Section 58-831.2).

The United States of America filed its Complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, on June 24, 1985, seeking a declaratory judgment that Section 58.1-3502 (formerly Section 58-831.2) was repugnant to the Supremacy Clause of the United States Constitution. The United States also sought temporary and permanent injunctive relief from the utilization of Section 3502. Finally, the United States sought a refund of all moneys remitted to the City of Manassas pursuant to Section 58.1-3502 (formerly Section 58-831.2). Named as defendants in the suit were the City of Manassas, Virginia and Arthur L. Shoemake, Commissioner of Revenue for the City of Manassas. The suit was brought under 28 U.S.C. §§ 1331, 1345 and 2201. The United States asked the District Court for a declaratory Judgment that Va. Code Ann. § 58.1-3502 (formerly Va. Code Ann. § 58.831.2) was unconstitutional; the United States sought preliminary and permanent injunctive relief prohibiting the City of Manassas and Arthur L. Shoemake, their employees, agents, attorneys, successors in office and all those acting in concert with them who shall receive notice of the injunction sought from imposing, assessing or collecting any tax pursuant to Section 3502 on property furnished by the United States to its contractors. Finally, the United States sought a refund, with interest, of all local personal property taxes that were paid to the City of Manassas by IBM for the tax years 1981 through 1984. The question sought to be reviewed on this appeal was first

raised at the District Court level in plaintiff's Complaint. The question was ultimately passed upon by the District Court in its January 30, 1986 Opinion granting appellant's Motion for Summary Judgment.

On August 14, 1985, William H. Forst, State Tax Commissioner for the Commonwealth of Virginia, filed his Motion to Intervene. (App. F at A-27). By Order dated September 23, 1985, the United States District Court for the Eastern District of Virginia, Alexandria Division, granted Mr. Forst's Motion to Intervene. (App. G at A-33). The District Court rendered its Judgment and Opinion on January 30, 1986, finding that although Section 3502 was seemingly discriminatory on its face, the Section would not be unconstitutional if the discrimination was justified. In considering the exemptions found for individuals leasing property from the Virginia Port Authority and Virginia Transportation Districts in the provisions Va. Code Ann. § 58.1-3502, the Court held that said exemptions were justified on public policy grounds. The Court thus granted appellants' Motion for Summary Judgment.

The United States of America filed its Notice of Appeal in the United States District Court for the Eastern District of Virginia, Alexandria Division to the January 30, 1986 Order of said Court, on March 28, 1986. (App. H at 35).

The question sought to be reviewed in this Appeal was raised in Appellee's Statement of Issues Presented for Review submitted to the Fourth Circuit on June 12, 1986. After briefing and oral argument, a panel of the Court of Appeals rendered its Opinion on October 6, 1987, vacating the District Court's Order, stating that the exemptions found in the provisions of § 58.1-3502 were not justified within the meaning of *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). Thus, the Fourth Circuit ruled upon the question which appellants' seek to review in its October 6, 1987 Opinion.

The appellants herein filed their Notice of Appeal in the United States Court of Appeals for the Fourth Circuit from the October 6, 1987 Order of said Court on December 23, 1987 (App. C at A-22). Neither the District Court nor the Court of Appeals certified to the Attorney General of Virginia, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of Va. Code Ann. § 58.1-3502 was drawn into question.

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that any state tax on the instrumentalities of the United States is invalid. Well into the twentieth century, the *McCulloch* rationale was used by this Court to invalidate any state tax which may have had the effect of increasing the costs to the federal government of performing its functions. *See, e.g., Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928)

It is, however, now axiomatic that the government's constitutional immunity from state taxation does not inure to the benefit of private parties with whom the government deals merely because all or part of the financial burden of the tax eventually falls on the government. *United States v. City of Detroit*, 355 U.S. 466 (1957).

Specifically, this Court has upheld state taxing schemes which reach a federal government contractor's interest in government provided property used by the contractor to perform cost-plus fee contracts entered into with the United States. "The use by the contractor (of government-provided property) for his own private ends--in connection with commercial activities carried on for profit--is a separate and distinct taxable activity." *United States v. Boyd*, 378 U.S. 39 (1964). *See also City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958).

In response to the trend found in this Court's opinions during the last four decades upholding the power of the states to tax a contractor's interest in tangible personal property provided to it by the United States government, the General Assembly of Virginia enacted § 58.1-3502 (formerly § 58-831.2) of the Code of Virginia. Section 3502 taxes the interest of a contractor engaged in business for profit which leases, borrows, or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local government in such leased or borrowed property.

Although the taxing scheme set forth in § 58.1-3502 was challenged below on grounds that it was in fact a direct tax on the United States, it is clear that the courts below did not consider such argument in determining the constitutionality of the taxing provision. Instead, the courts below have focused on two exceptions to the provisions of § 58.1-3502 contained in the statute in determining its constitutionality. Section 3502 provides exemptions from its provisions for contractors with respect to property owned by the Virginia Port Authority and leased in connection with piers and marine terminals and related facilities. Section 3502 also provides an exemption from its provisions for contractors with respect to property owned by any transportation district organized under the Transportation District Act of 1964 and leased to provide transportation services.

The question thus becomes whether the exemptions from the provisions of the tax set forth in Va. Code Ann. §58.1-3502 (formerly Va. Code Ann. § 58-831.2) on machinery and tools used in manufacturing furnished to IBM by the United States for the performance of certain contracts entered into between IBM and the Department of Defense render the statute as a whole repugnant to the Supremacy Clause of the United States Constitution.

The question of whether exemptions to the provisions of state taxing statutes benefiting those who contract with certain state entities offend the United States Constitution has been tangentially studied by this Court. In *United States v. Department of Revenue of the State of Illinois,* 191 F. Supp. 723 (N.D. Ill. 1961), *vacated*, 368 U.S. 30 (1961), on remand, 202 F. Supp. 757 (N.D. Ill. 1962), *aff'd*, 371 U.S. 21 (1962), this Court approved a taxing scheme which exempted from a retailer's occupation tax certain non-governmental units such as charities, schools and churches based upon the public good nature of the exemption.

The Sixth Circuit Court of Appeals in *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969), approved a Michigan taxing scheme which created an exemption in favor of state supported educational institutions on the grounds that the exemption was conducive to the welfare of the general public. The Sixth Circuit based its opinion in *Chrysler* on the language implemented by this Court in its opinion in *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). In *Phillips*, two Texas taxing statutes, taken in combination, subjected lessees of federally owned lands to a more onerous use tax than all similarly situated lessees of state-owned property. Before ruling on the constitutionality of the taxes, this Court stated, in the *Phillips* opinion, that "[t]he discrimination against the United States and its lessees seems apparant. The question, however, is whether it can be justified." *Id.* at 382.

The Fourth Circuit Court of Appeals struck down Section 3502 as violative of the United States Constitution, finding that this Court's Opinion in *Phillips Chemical Co. v. Dumas School District,* 361 U.S. 376 (1960) did not sanction an analysis of the justification of a discriminatory tax. The Fourth Circuit refused to follow the majority in *Chrysler Corporation v. Township of Sterling*, in essence, holding that a tax which treats some state contractors differently than federal contractors can never be justified on any grounds.

CONCLUSION

The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court of appeals—an act of great importance which has substantial potential consequences. Furthermore, the Fourth Circuit's Opinion in the matter below has created a clear conflict between the Fourth Circuit and the Sixth Circuit as to the ability of a state to justify a discriminatory tax on public policy grounds. This substantial and important issue is worthy of this Court's full consideration.

Respectfully submitted,

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January 4, 1988

PROOF OF SERVICE

I hereby certify that this Jurisdictional Statement was mailed, postage prepaid, pursuant to Rule 12 of the Rules of the United States Supreme Court this 4th day of January, 1988 to the Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and the Honorable Edwin R. Meese, c/o Michael L. Paup, Esq. and Richard A. Correa, Esq., Attorneys, Tax Division, Department of Justice, P.O. Box 502, Washington, D.C. 20044. All parties required to be served have been served. (Rule 28.5 of the Rules of the Supreme Court of the United States).

James W. Hopper

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 86-2544

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CITY OF MANASSAS, VIRGINIA;
ARTHUR L. SHOEMAKE, Commissioner
of Revenue for the City of Manassas;
William H. Forst, State Tax Commissioner
of the Commonwealth of Virginia,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge (C/A A-85-731-A)

Argued December 10, 1986 Decided October 6, 1987

Before WIDENER and ERVIN, Circuit Judges, and HENDERSON, United States District Judge for the District of South Carolina, sitting by designation.

John Joseph McCarthy, Tax Division, Department of Justice (Roger M. Olsen, Assistant Attorney General; Michael L. Paup, Jonathen S. Cohen; Richard A. Correa; Henry E. Hudson, United States Attorney, on Brief) for Appellant; James Walter Hopper (Gardner, Moss & Hopper; Mary Sue Terry, Attorney General; Kenneth W Thorson, Senior Assistant Attorney General; Marion S. Cooper, Assistant Attorney General, on brief) for appellees.

WIDENER, Circuit Judge:

The United States appeals from the Judgment of the district court upholding the constitutionality of § 58.1-3502 of the Virginia Code, which subjects users of federally owned property to taxation by local governments. Because we feel that the Commonwealth's taxing scheme unjustifiably discriminates against the United States and those with whom it deals, we vacate the judgment of the district court and remand for action not inconsistent with this opinion.

Since 1981, the United States Defense Logistics Agency has supervised numerous contracts performed by International Business Machines Corporation (IBM) for the Defense Department at IBM's facility in Manassas, Virginia. The Bulk of these contracts involve services performed for the Department of the Navy in research and development, design, assembly and testing of signal processing and submarine sonar systems. Under these contracts, the United States provides government property, including machinery and tools, to IBM for use in performing these services, and the contracts provide that IBM may use United States property only in performance of these contracts, and not in performance of non-federal contracts or for its own account. The United States pays IBM a fee for these services which constitutes IBM's profit, and the United States pays all expenses incurred in IBM's performance, including the taxes at issue here.

On June 23, 1981, the City of Manassas informed IBM that under Va. Code § 58-831.2 (recodified as § 58.1-3502), it was subject to taxation with respect to the property furnished to it by the federal government. This section reads:

> § 58.1-3502. Tangible personal property leased, loaned, or otherwise made available to a private party from agency of federal, state or local government. -- Any person, firm, association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (§ 15.1-1342 et seq.) and leased to provide transportation services.

IBM paid, under protest, personal property taxes under this section totalling $290,364 for the years 1981-84, and was thereafter reimbursed by the United States.

The United States subsequently filed suit in United States District Court for the Eastern District of Virginia, claiming that the tax was unconstitutional and seeking a refund of taxes collected and injunctive relief. From a judgment for the defendant, the government appeals.

On appeal, the United States raises two issues: (1) whether the Virginia tax is unconstitutional because it imposes a greater burden on federal contractors than on those contracting with the Virginia Port Authority or local transportation districts, and (2) whether the statute unconstitutionally taxes the property of the United States

by taxing the full value of the property used, rather than the contractor's possessory interest in that property. Because we find that the exemptions for certain state instrumentalities render the tax invalid as applied to IBM, we do not address the question of how such a tax might properly be computed were it applied non-discriminatorily.

Ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the federal courts have looked very closely at the burdens that state taxation schemes place on the federal government. In that case, the Supreme Court struck down a Maryland tax on notes of the Bank of the United States as a violation of the Supremacy Clause.[1] Although there has been much water over the dam since the day when the Court proclaimed that "the power to tax involves the power to destroy," it remains axiomatic that a state or local tax may not discriminate against the United States or those with whom it deals. See, e.g. *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961).

There are limits to the doctrine of federal tax immunity, however. While no direct tax can be levied on the United States, immunity will not be conferred merely because a state tax ultimately burdens the United States, even if the United States shoulders the entire economic burden of the tax. *Alabama v. King & Boozer*, 314 U.S. 1 (1941). Likewise, there is no immunity simply because the state tax is assessed on contractors providing services to the government. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). "And where a use tax is involved, immunity cannot be conferred simply because the State is laying the tax on the use of federal property in private hands, . . even if the private entity is using the Government property to provide the United States with goods . . . or services." *United States v. New Mexico*, 455 U.S. 720, 734 (1982). (Citations omitted)

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[1]United States Constitution, article VI § 2.

The controlling case with respect to discriminatory state use taxes is *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). In that case, Phillips Chemical Company leased industrial realty from the United States, and was taxed by the Dumas Independent School District according to that district's usual ad valorem tax procedures. This tax was assessed under the authority of a Texas statute which enabled the State and its political subdivisions to tax private users of federal realty. Although the subject of the tax was the right to use the property, the leasehold, the measure used was the value of the fee. 361 U.S. at 379.

By contrast, users of state owned property were taxed under a different statute. As construed by the Texas courts, this tax was less burdensome than the one imposed on users of federal property in three ways. First, the tax was measured by the value of the leasehold, not the value of the fee. Next, no tax was imposed on a lessee whose lease was for less than three years. Finally, a lease for longer than three years would not be considered taxable as such under the statute if the lease was subject to termination at the lessor's option in the event of a sale, as was Phillips' lease from the United States. Since Phillips' lease was so subject to termination, it would have paid no taxes under this section had it leased the property from the State rather than the United States. 361 U.S. at 382.

The Court held that the tax unconstitutionally discriminated against lessees of federal property. There was no question tha the Texas tax imposed a heavier burden on lessees of federal property than lessees of State property. In relieving Phillips of the tax, the Court noted that "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U.S. at 385.

In analyzing the tax at issue, the Court noted that an allegedly discriminatory tax could not be analyzed in a vacuum. "[I]t is necessary to determine how other taxpayers similarly situated are treated," and "[s]uch a determination requires 'an examination of the entire tax structure of the state' ". 361 U.S. at 383 (citations omitted.) Significantly, the Court did not hold that facial discrimination alone rendered the statute unconstitutional. "The discrimination against the United States and its lessees seems apparent. The question, however, is whether it can be justified." 361 U.S. at 382. Resolution of this case depends on the meaning of "justified" as used by the Court in *Phillips*.

In this case, all users of property are taxed alike, with the exception of those who use the property of the Virginia Port Authority and local transportation districts, both of which are subdivisions of the government of the Commonwealth.[2] As in *Phillips*, then, the discrimination against the federal government in favor of subdivisions of the state government is obvious, even though it may not extend to all state owned lands as in *Phillips*. The district court thought that the favorable treatment given to the Virginia Port Authority and the local transportation districts was justified because the affected state instrumentalities are involved in areas of "vital concern" to the federal government as well as the state government. As to the Port Authority, the district court noted that, with the exception of intrastate commerce, the federal government has jurisdiction over and regulates virtually every aspect of shipping, and that the Port Authority is "specifically empowered to cooperate with the United States and its instrumentalities in the maintenance, development, improvement and use of harbors and seaports of the Commonwealth."

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[2]The Port Authority is an agency of the Commonwealth, and local transportation districts are political subdivisions thereof.

With respect to the exception for local transportation districts, the district court found that the federal government had indicated "concern and involvement in mass transportation" through the enactment of the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq. This act declares the Congressional purpose is

> (1) to assist in the development of improved mass transportation. . . (2) to encourage the planning and establishment of area wide urban mass transportation systems. . . and (3) to provide assistance to State and local governments and their instrumentalities in financing such systems. . . .

49 U.S.C. § 1601(b) (1986) The district court also found that one of the Virginia General Assembly's purposes in creating local transportation districts was the economical utilization of public funds. The district court concluded that it was "apparent that the federal government has concerns and involvement which are similar to and furthered by the exemption of the Virginia Port Authority and local transportation districts and that federal tax monies in both areas are spared because of the exemptions." Therefore, because the United States benefits as well as the Commonwealth from the promotion and support of these state agencies, the district court held that the exemptions were justified.

The district court relied on a somewhat similar case from the Sixth Circuit, *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969). In *Sterling*, the court examined a Michigan use tax which exempted, inter alia, "property of any state-supported educational institution." The Supreme Court of Michigan had given a restrictive interpretation of this phrase so that it encompassed only institutions without separate taxing power, amounting to thirteen schools, but which included the University of Michigan, Michigan State University, and Wayne State University, for example.

The Sixth Circuit found that the State of Michigan had no intent to discriminate against the United States in favor state-supported educational institutions, but only intended to benefit those institutions.[3] Although lessees of federal property were not treated as favorably as lessees of exempt state schoc' property, the court held that this discrimination was justified because it was "founded upon the well-recognized policy of both the United States and the State of Michigan to protect, promote and support education, including colleges and universities." 410 F.2d at 70. The court stressed the high levels of federal funding received by the exempt institutions, concluding that "[t]he involvement of the United States along with the States with direct financing of institutions of higher learning completely dispels the contention that the exemption . . . constitutes an unjustified discrimination against the United States and its lessees." 410 F.2d at 70. Therefore, the tax assessment was upheld.[4] Chief Judge Weick dissented, finding no authority for allowing any justification of discrimination against the United States and its lessees.

With respect, we agree with the result advocated by the dissent and do not follow the analysis followed by the majority in *Sterling* and of the district court here. Implicit in that analysis is that *Phillips* articulated a two-part test for determining the constitutionality of allegedly

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[3]The primary benefits were identified as encouragement of gifts and bequests to the endowments of state-supported schools, and the tax treatment of the University of Michigan as grantee, for example, of an airport from the United States. 410 F.2d at 69.

[4]The court also found that the discrimination was minimal, and thus not rising to constitutional dimension, because the amount of affected property of state-supported educational institutions was "infinitesimal by comparison" to the total taxable realty in the State. 410 F.2d at 70. We doubt for the proposition that tax discrimination against the United States may be permissible depending on the quantum of the discrimination.

discriminatory state taxes in this area: (1) whether the users of federal property are treated less favorably than similarly situated users of state property, and (2) if so, whether such discrimination is justified in light of the state and federal interests involved. We think this misconceives the Court's decision in *Phillips*.[5] Although *Phillips* does contain language concerning justification of discriminatory taxes as a matter of rationality in an equal protection context, it appears to us that what the Court meant by justification was a showing that the two classes of users, from federal and state sources, are not similarly situated, so that in essence there is no discrimination. The Court made this clear when it stated that "[t]he imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt [state] public property must be justified by *significant differences between the two classes*." 361 U.S. at 383 (emphasis added). In other words, justification, as used in *Phillips*, relates to whether the user of federal property is similarly situated to a user of state exempt property, not whether discrimination between otherwise similarly situated users can be justified on grounds of general public policy, be it state or national.[6]

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[5]We also do not agree with *Sterling* regarding the significance of a finding that the state legislature's purpose was not to discriminate against the United States and its lessees, rather only to benefit the exempt instrumentalities. First, we must question whether a State with such a taxing scheme can truly be said not to intend any discrimination against the United States, in light of the maxim that every man is considered to intend the natural and probable consequences of his acts, which is yet in vogue in civil cases. Furthermore, even if such a lack of discriminatory intent be found, we doubt its relevance, since the United States would still receive the unfavorable tax treatment about which it complains. To follow that logic would allow the States to exempt their leasing operations on the ground that they merely sought to further their own laudable public purposes, not to burden the federal government.

[6]See also *United States v. County of Fresno*, 429 U.S. 452, 462 (1977) " . . . the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." (Footnote omitted)

Here, the Commonwealth treats those who lease from its governmental instumentalities better than it treats those who lease from the United States. If IBM used the property of the Virginia Port Authority, for example, to perform the very same contracts, no tax would have been assessed. We do not think that *Phillips* can be read as allowing such a discriminatory tax to be justified on the ground that general federal and state public interests are served by the discrimination. If federal aid to state agencies operated as an implied consent to discriminatory taxation,[7] there would be a myriad of areas a State could exempt from taxes which the federal government would have to pay. Even as a practical matter, the level and breadth of federal aid to the States is simply too great to engage in this kind of analysis, which, if carried to its logical conclusion, could result in the crippling of the tax immunity doctrine for those who deal with the federal government. Most importantly, the proper inquiry is not whether the federal courts conceive that federal interests are advanced by the discriminatory exemption, but whether the United States may be forced to acquiesce in the State's judgment that these interests are so served.

In sum, we are of opinion that Virginia Code § 58.1-3502 does not tax those who lease from the Virginia Port Authority and transportation districts the same as those who lease from the United States. This much is apparent. We are further of opinion that such discriminatory taxation against those who deal with the United States is not justified within the decision in *Phillips* . . There is no indication that if two people, each leased identical tangible personal property for the same purpose, one lot of which was owned by the Virginia Port Authority, the other lot being owned by the United States, that the discriminatory tax would be enforced. There is no distinction made in this record

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[7]See also *Chrylser Corporation v. Township of Sterling*, 410 F.2d 62, 78 (6th Cir. 1969) (Chief Judge Weick dissenting).

between lessees from the state and national governments, and none is offered by the Commonwealth. Thus, the discriminatory taxation as applied to IBM is not justified under *Phillips*.

The judgment of the district court is vacated and the case remanded for action not inconsistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

Civil Action

No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Defendant-Intervenor.

ORDER

This matter has been submitted to the Court upon the briefs of the parties, a joint stipulation of facts and argument of counsel at a hearing on ther merits held December 13, 1985.

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that summary judgment is GRANTED in favor of the defendants and the plaintiff's action is DISMISSED.

DATED: Jan 30, 1986 /s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas,
Defendants.

Civil Action

No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Defendant-Intervenor.

MEMORANDUM OPINION

This action was instituted by the United States for the purpose of obtaining (1) a declaratory judgment that Code of Va. § 58-831.2 unconstitutionally discriminates against the United States by permitting taxation of property furnished by the United States to its contractors but not subjecting to tax the use of property furnished by the State to certain contractors or property leased by local transportation districts; (2) preliminary and permanent injunctions preventing the defendants and those acting in concert with them from imposing, assessing or collecting taxes pursuant to Va. Code Ann. § 58-831.2 on property owned by the United States and furnished to its contractors; and (3) for a refund of taxes paid to the City of Manassas from 1981 to 1984 by International Business Machines Corporation ("IBM") pursuant to Va. Code Ann. § 58.831.2.

IBM Federal Systems Division, which is located in the City of Manassas, has a number of contracts with the Department of Defense and administered by the Defense Logistics Agency, including approximately twenty-nine contracts involved in this case which are primarily contracts let by the Navy for advanced signal processing and submarine sonar work. Some of the contracts are for research and development and others are production contracts which involve manufacturing and testing of equipment. IBM receives a fee in addition to reimbursement of its costs for the performance of these contracts. The contract fees are a profit for IBM.

Under the contacts, the United States through the Defense Logistics Agency has provided Government—owned property to IBM. The provisions of the contracts and federal regulations allow this property to be used only in the performance of Government contracts.

On June 23, 1981, the City of Manassas informed IBM by letter that by Code of Virginia § 58-831.2, IBM was subject to local taxation and that under Virginia law manufacturers are subject to local taxation on machinery and tools used in manufacturing such as the machinery and tools furnished to IBM by the Federal Government for the performance of the contracts at the Manassas facility . At the direction of the Defense Logistics Agency, IBM has paid the City of Manassas under protest the taxes assessed pursuant to Code of Va. § 58-831.2 for the tax years 1981 through 1984. The amounts of the taxes that have been paid are as follows:

Tax Year	**Amount Paid**
1981	$69,179
1982	71,397
1983	73,318
1984	76,471
Total	$290,364

The contracts between IBM and the Department of Defense are cost-plus fee contracts which taxes such as the taxes imposed pursuant to Code of Va. § 58-831.2 by the defendants are reimbursable costs. IBM has been reimbursed by the United States for the tax payments listed above. The United States is therefore the real party in interest. William H. Forst, State Tax Commissioner of Virginia has been permitted to intervene in this action pursuant to F.R.C.P. 24(b)(2) in order to defend the statute in issue.

The taxes imposed pursuant to Va. Code Ann. § 58-831.2, by the defendant, the City of Manassas, on the use of Government property furnished to IBM were assessed at the original cost of the property less depreciation.

This case is presently before the Court upon the briefs of the parties and a joint stipulation of facts. Based on the stipulation of facts and arguments presented at a hearing on December 13, 1985, I find that the material facts are not in dispute and summary judgment is appropriate under F.R.C.P. 56.

The statute under consideration, Code of Va. § 58-831.2, states as follows:

> Any person, firm, association, unincorporated company, or corporation engaged in business for profit who are which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964.

This statute has since been recodified, without amendment of its provisions, at § 58.1-3502.

The Virginia Port Authority is an agency of the Commonwealth of Virginia established by Code of Va. §62.1-128 *et. seq.* Local transportation districts are political subdivisions of the Commonwealth of Virginia created by § 15.1-1342 *et seq.* The parties are in agreement that the City of Manassas is not a member of a local tranportation district commission, and that the Virginia Port Authority does not exercise its authority in the City of Manassas in that there are no water terminals, port facilities or other such authority property local within the geographical boundaries of the City of Manassas.

The defendants contend that because there are no Virginia Port Authority contractors or local transportation district contractors within the boundaries of the City of Manassas, the statute it not unconstitutional because it has not been discriminatorily applied. However, the proper examination of the statute is an examination of its language and its affect in the State and not its application in a particular local jurisdiction. *Phillips Chemical Co.*, 361 U.S. 376 (1960) requires a determination of how other taxpayers similarly situated are treated and that determination requires an examination of the whole tax structure of the state.

The United States' first argument is that § 58-831.2 is unconstitutional on its face in that it authorizes the imposition of local personal property taxes on property furnished to contractors of the Federal Government but does not apply to property furnished to contractors of the Virginia Port Authority or local transportation districts.

A state tax may not discriminate against the Federal Government or those with whom it deals. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *Phillips Chemical Co., supra*, the Supreme Court ruled on a Texas statute which authorized the taxation of the full value of property leased by a

Federal Government contractor, but not contractors with similar leases, using tax exempt property owned by the state and its political subdivisions. The court held that while a statute is seemingly discriminatory against the United States, the inquiry must go further to determine whether the statute is discriminatory in its application or the discrimination can be justified. The State of Texas argued that the state could collect in rent what it loses in taxes from its own lessees and could not from the United States government. It also argued that the state may legitimately foster its own interests by adopting measures which facilitate the leasing of its property, and that federal leasing of exempt land has a more serious impact on the fincances and operations of local government than do the states own leasing activities. The court held that none of these arguments were adequate to justify what appears to be so substantially and transparent a discrimination against the government.

As seen in *Phillips*, although a statute is seemingly discriminatory on its face, it will not be unconstitutional if the discrimination is justified. Likewise, the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state. *United States v. County of Fresno*, 429 U.S. 452 (1977). In *Washington v. United States*, 460 U.S. 536 (1983) the Supreme Court affirmed its holding in *Phillips* in rejecting the argument that a tax is invalid simply because it treats those who deal with the Federal Government differently than it treats others, and again stated that the discrimination whether a tax is discriminatory requires an examination of the whole tax structure of the state.

In the present case, § 58-831.2 of the Code of Virginia carves out two classes of exempt property: the Virginia Port Authority and local transportation districts. Both areas are of vital concern to the Federal Government as well as the state. With the exception of intrastate commerce, the Federal

Government has jurisdiction over and regulates virtually every aspect of shipping. The Virginia Port Authority was established by the General Assembly to foster and stimulate the commerce of the ports of the Commonwealth (*See* Joint Stipulation No. 16). Among other things, the Authority is granted police powers regarding matters affecting the safety and security of Authority property. Code of Va. § 62.1-131.11. And the Authority is specifically empowered to cooperate with the United States and its instrumentalities in the maintenance, development, improvement and use of harbors and seaports of the Commonwealth § 62.1-132.13.

Similarly, the federal government indicated its concern and involvement in mass transportation by the enactment of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et. seq.*, which declares Congressional policies designed:

> (1) to assist the development of improved mass transportation . . . (2) to encourage the planning and establishment of area wide urban mass transportation systems . . . (3) to provide assistance to State and local governments and their instrumentalities in financing such systems . . . 49 U.S.C. § 160 (b)

Likewise, the General Assembly's purpose in establishing local transportation districts was to promote the orderly growth and development of the urban areas of the Commonwealth for the safety of its citizens and for the economic utilization of public funds (Joint Stipulation No. 20). The exemption of transportation district property further promotes both the Federal and State purposes by removing the additional expense accompanying the acquisition of equipment necessary to facilitate the above mentioned objectives.

It becomes apparent that the federal government has concerns and involvement which are similar to and furthered by the exemption of the Virginia Port Authority and local transportation districts and that federal tax monies in both areas are spared because of the exemptions.

A similar case was presented in *Chrysler Corporation v. Township of Sterling,* 410 F.2d 62 (6th Cir. 1969) where a Michigan use tax was attacked. The statute, referred to as Act 189, provided as follows:

> When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park market, fairground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user was the owner of such property. Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

The *Chrylser* case arose out of the assessment by the Township of Sterling of an annual tax on Chrysler's use and occupancy of a U.S. Government-owned plant. Chrysler occupied and used part of the plant for manufacture of weapons for the Department of the Army.

The Sixth Circuit examined, *inter alia,* the statutory exemption for property of state-supported educational institutions and found it to be "reasonable and valid because it is founded upon the well recognized policy of both the United States and the State of Michigan to protect, promote and support education, including colleges and universities. The involvement of the United States along with the States with direct financing of institutions of higher learning completely dispels the contention that the exemption of Michigan state-supported universities and colleges under Act 189 constitutes an unjustifiable discrimination against the United States and its lessees." 410 F.2d at 70.

Likewise, the United States benefits as well as the State from the promotion and support of Virginia Port Authority and transportation districts. Many federal dollars are spent in both areas and the exemption under the Virginia statute should provide some financial benefits to the United States. Other than two narrow exceptions, which benefit both the Federal and State governments, both Federal and State government contractors are treated the same. That is, property of either government in the hands of a contractor is taxed at the same rate.

Accordingly, the exemptions contained in § 58-831.2 for the Virginia Port Authority and local transportation districts do not discriminate against the United States but creates justified exemptions which benefit both the State and Federal Governments.

The other Constitutional attack on § 58-831.2 by the United States is that the statute fails to tax the interest of the contractor in the government property and thus is in reality a tax on the United States. In particular, in imposing the tax authorized, the City of Manassas assessed IBM's machinery and tools at their original cots, less depreciation. As the United States is the owner of the property, assessing the full value of the property to IBM, which does not have a full ownership interest, it is argued, necessarily results in the taxation of a portion of the interest of the United States in the property. Taxation of the property of the United States is unconstitutional.

§ 58-831.2 states in pertinent part that government contractors:

> shall be liable to local taxation . . . to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof.

Code of Va. § 58-831 requires that machinery and tools segregated for local taxation "shall be valued by means of depreciated cost . . . "

The U.S. Supreme Court has already ruled however, that a use tax, as opposed to a property tax, may be based on the full value of the property used. In *United States v. Boyd,* 378 U.S. 39 (1964) a use tax was imposed upon profit-making contractors of the United States and measured by the purchase price or fair market value of the property so used, whichever was greater. The Court upheld the Constitutionality of this tax, even though it was measured by the value of the government-owned property.

Similarly, in *United States v. City of Detroit,* 355 U.S. 466 (1958), a Michigan statute made the lessees of government property "subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property . . . " p. 468, n. 1. Alike its argument in the instant case, the United States argued in *Detroit* that because the tax was measured by the value of the property, it should be treated as a tax on the property. The Supreme Court was not persuaded and stated:

> A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. (citations omitted.) In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used . . . In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used. *Detroit* at 470.

Like the Michigan tax in *Detroit*, the tax in issue here is imposed upon IBM's use of the government-owned machinery and tools; not upon the property itself. The measurement of such tax by its original cost less depreciation is, therefore, a fair and permissible method of valuation.

Accordingly, an appropriate order will enter denying plaintiff's requested relief and entering judgment for the defendants.

DATED: Jan 30, 1986 /s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2544

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for The City of Manassas,

Defendants-Appellees,

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia

Intervenor-Appellee.

NOTICE OF APPEAL

COME NOW the Appellees, City of Manassas, Virginia, Arthur L. Shoemake, and William H. Forst, by counsel, pursuant to Rule 10 of the Rules of the United States Supreme Court, and hereby notice their appeal from the October 6, 1987 decision of this Court vacating the January 30, 1986 Order of the United States District Court for the Eastern District of Virginia, Alexandria Division. This appeal is taken by the above-references parties pursuant to 28 U.S.C. § 1254 (2).

Respectfully submitted,

CITY OF MANASSAS, VIRGINIA,
ARTHUR L. SHOEMAKE, and
WILLIAM H. FORST

By /s/ James W. Hopper
Of Counsel

James W. Hopper, Esq.
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Honorable Mary Sue Terry
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Senior Assistant Attorney General
Marion S. Cooper, Esq.
Assistant Attorney General
101 N. Eighth Street

Richmond, Virginia 23219
(804) 786-6554

PROOF OF SERVICE

I hereby certify that this Notice of Appeal was mailed, postage prepaid, pursuant to Rule 10 of the Rules of the United States Supreme Court this 23rd day of December, 1987, to the Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Honorable Edwin R. Meese, c/o Michael L. Paup, Esq. and Richard A. Correa, Esq., Attorneys, Tax Division, Department of Justice, P.O. Box 502, Washington, D.C. 20044. All parties required to be served have been served. (Rule 28.5 of the Rules of the United States Supreme Court.

/s/ James W. Hopper

James W. Hopper

Filed: December 23, 1987

APPENDIX D

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch 646, § 1, Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P.L. 96-486, § 2(a), 94 Stat. 2369.)

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by an agency or officer therof expressly authorized to sue by Act of Congress.

(June 25, 1948, c. 646, § 1, 62 Stat. 933.)

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, P.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P.L. 94-455, Title XIII, § 1306(b) (8), 90 Stat. 1719.)

§ 58.1-3502. Tangible personal property leased, loaned, or otherwise made available to a private party from agency of federal, state or local government. — Any person, firm; association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (§ 15.1-1342 et seq.) and leased to provide transportation services. (Code 1950, § 58-831.2; 1960, c. 239; 1975, c. 504; 1980, c. 1981, c. 442; 1984, c. 675.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia
Applicant for Intervention.

MOTION TO INTERVENE AS A DEFENDANT UNDER FEDERAL RULES OF CIVIL PROCEDURE RULE 24(b) (2)

William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, moves for leave to intervene as a defendant in his official capacity in this action for the purpose of defending the Virginia tax statute in issue and thereby to assert the defenses set forth in his proposed Answer, a copy of which is hereto attached. The State Tax Commissioner recognizes that there is no liability on the part of the Commonwealth of Virginia inasmuch as the tax revenue derived from the operation of said statute inured solely to the benefit of the City of Manassas. The State Tax Commissioner asserts, however, that the is entitled to intervene under Fed. R. Civ. P. 24(b) (2) on the grounds (1) that whenever deemed advisable, he has a public duty to intervene in any action wherein the constitutionality of a State revenue statute is in

question and 2) that he has a duty to assist in the administration of the statute in issue. The State Tax Commissioner further asserts that he has defenses to Plaintiff's claim presenting wuestions of both law and fact which are common to the main action. Finally, the State Tax Commissioner asserts that his intevention will not unduly delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, your Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, respectfully prays that this Honorable Court allow him to intervene in this action for the reasons set forth in this motion as as are more fully set forth in the accompanying memorandum of authorities.

Respectfully submitted,

WILLIAM H. FORST
STATE COMMISSIONER OF THE
COMMONWEALTH OF VIRGINIA

By /s/ Marion S. Cooper
Counsel

Willliam G. Broaddus
Attorney General of Virginia

Kenneth W. Thorson
Senior Assistant Attorney General

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0061

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion to Intervene was mailed, postage prepaid, to James W. Hopper, Attorney for the City of Manassas, *et al.* at P.O. Box 1201, Richmond, Virgina 23209; Elsie L. Munsell (Joseph A. Fisher, III, Assistant U.S. Attorney), United States Attorney for the Eastern District of Virginia, 701 Prince Street, Alexandria, Virginia 22314; and Glen L. Archer, Jr., Edward J. Snyder, and Richard A. Correa, Attorneys, Tax Division, United States Department of Justice, Washington, D.C. 20530; Attorneys for the United States of America this 13th day of August, 1985.

/s/ Marion S. Cooper
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants. No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Applicant for Intervention.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

In support of his Motion to Intervene, your Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, offers the following Memorandum of Authorities:

STATEMENT OF THE CASE

(1) The United States brought suit in the Eastern District of Virginia against the City of Manassas and Arthur L. Shoemake, Commissioner of Revenue for the City of Manassas, to have Va. Code § 58-831.2 (now recodified as § 58.1-3502) declared unconstitutional, to enjoin preliminarily and permanently the defendants from enforcing the statute, and for a refund of taxes totaling $290,364 plus interest paid to City of Manassas by International Business Machines (as a

contractor for the United States) for which the United States reimbursed International Business Machines.

(2) The State Tax Commissioner now seeks to intervene in this action to defend Va. Code § 58-831.2 pursuant to Fed. R. Civ. P. 24(b) (2).

GROUNDS FOR INTERVENTION

The constitutionality of Va. Code § 58-831.2 has been questioned. The State Tax Commissioner contends upon the law and facts that such statute is not unconstitutional. In support of his argument, the State Tax Commissioner will set out a full development of the law and facts surrounding the statute in question. Thus, the requirement of Fed. R. Civ. P. Rule 24(b) (20 that there be common questions of law and fact between the main action and the defense of the intervener is met by the State Tax Commissioner.

Furthermore, the court may permit an applicant to intervene under Fed. R. Civ. P. 24(b) (2) if such applicant is charged with a public duty to do so. *See Jewell Ridge Coal Corp. v. Local No. 6167,* 3 F.R.D. 251, 254 (W.D. Va. 1983) (noting that an applicant charged with a public duty which reasonably required him to intervene in a pending case may be permitted to intervene even though the applicant has no direct personal or pecuniary interest in the subject of the litigation). The State Tax Commissioner has a public duty ot intervene. Va. Code § 58-33(5) (now recodified as § 58.1-202(9) provides that the State Tax Commissioner shall:

> "Intervene, by petition or otherwise, whenever deemed advisable in any action or proceeding pending in any court wherein the constitutionality or construction of any State tax or revenue statute or the validity of any State Tax is in question; and the court wherein such action or proceeding is pending may, by order entered therein, make the Commissioner a party thereto whenever deemded necessary."

Thus, the Applicant is charged with the public duty necessary to permit his intervention.

Additionally, Fed. R. Civ. P. 24(b) (2) provides that:

> "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action."

Va. Code § 58-33(2a) prescribes that the State Tax Commissioner shall "[p]rovide commissioners of the revenue with information and assistance in the assessment of personal property." Furthermore, § 58-857 (now recodified as § 58.1-3105) provides that the "State Tax Commissioner shall . . . give instructions to the commissioners of the revenue in respect to their duties . . . " Accordingly, the State Tax Commissioner is responsible for assisting in the administration of the statute is issue inasmuch as such statute subjects tangible personal property to local use taxation.

For intervention to be allowed under Fed. R. Civ. P. 24(b) (2) it must not unduly delay or prejudice the adjudication of the rights of the original parties. At this early stage in the proceeding where there has been no discovery, it does not appear that delay or prejudice will result if intervention is allowed. *See Alexander v. Hall,* 64 F.R.D. 152, 157 (D.S.C. 1974).

WHEREFORE, the Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, respectfully prays that this Honorable Court allow his

intervention in this case as a party defendant pursuant to Fed. R. Civ. P. Rule 24(b)(2) on the issue of whether Va. Code § 58-831.2 is unconstitutional.

Respectfully submitted,

WILLIAM H. FORST,
STATE TAX COMMISSIONER OF THE
COMMONWEALTH OF VIRGINIA

By: /s/ Marion S. Cooper
Counsel

William G. Broaddus
Attorney General of Virginia

Kenneth W. Thorson
Senior Assistant Attorney General

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0061

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum of Authorities in support of Motion to Intervene was mailed, postage prepaid, to James W. Hopper, Attorney for the City of Manassas, *et al.* at P.O. Box 1201, Richmond, Virgina 23209; Elsie L. Munsell (Joseph A. Fisher, III, Assistant U.S. Attorney), United States Attorney for the Eastern District of Virginia, 701 Prince Street, Alexandria, Virginia 22314; and Glen L. Archer, Jr., Edward J. Snyder, and Richard A. Correa, Attorneys, Tax Division, United States Department of Justice, Washington, D.C. 20530; Attorneys for the United States of America this 13th day of August, 1985.

/s/ Marion S. Cooper
Assistant Attorney General

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

FILED
SEP 22 1985
Clerk, U.S. District Court
Alexandria, Virginia

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia
Applicant for Intervention.

ORDER

UPON CONSIDERATION of the formal papers filed by William H. Forst, State Tax Commissioner for the Commonwealth of Virginia, as an Applicant for Intervention in this action and

IT APPEARING to the Court that the Applicant is entitled to intervene in this action,

IT IS ORDERED that said Applicant be permitted to intervene in this action pursuant to Fed. Rule Civ. P. 24(b) (20 in order to defend the statute in issue.

ENTER:

/s/ G. R. B.

Judge

9/23/85

I ask for this:

/s/ Marion S. Cooper

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Seen and agreed:

/s/ James W. Hopper

James W. Hopper
Attorney for Defendants

/s/ Richard A. Correa

Richard A. Correa
Attorney for Plaintiff

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
et al.,

Defendants.

and

WILLIAM H. FORST,
State Tax Commissioner of the
Commonwealth of Virginia
Defendant-Intervenor

NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Fourth Circuit from the January 30, 1986 judgment of the United States District Court for the Eastern District of Virginia.

Dated March 28, 1986.

JUSTIN W. WILLIAMS
United States Attorney

By: /s/ Joseph A. Fisher, III
Assistant United States Attorney

/s/ Richard A. Correa
RICHARD A. CORREA
Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6555

Attorneys for the Plaintiff,
the United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 28th day of March, 1986 to each of the following:

Honorable Marion S. Cooper
Assistant Attorney General
Commonwealth of Virginia
101 N. 8th Street
Richmond, VA 23219

and

James W. Hopper, Esq.
Gardner, Moss & Rocovich
P.O. Box 1201
Richmond, VA 23209.

/s/ Joseph A. Fisher, III

Joseph A. Fisher III
Assistant United States Attorney
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Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1117

In The
Supreme Court of the United States
October Term, 1988

CITY OF MANASSAS, VIRGINIA, *et al.*,
Appellants,
and
WILLIAM H. FORST,
Intervenor-Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF TENNESSEE AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

W. J. MICHAEL CODY
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QUESTIONS PRESENTED

Does Virginia Code Ann. § 58.1-3502 (Repl. Vol. 1984) unconstitutionally discriminate against the United States and the contractors with whom It deals?

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No. 87-1117

In The

Supreme Court of the United States

October Term, 1988

CITY OF MANASSAS, VIRGINIA, *et al.*,
Appellants,

and

WILLIAM H. FORST,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF TENNESSEE AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

In accordance with this Court's Rule 36, the State of Tennessee, through its Attorney General, W.J. Michael Cody, submits this brief as amicus curiae in support of the Jurisdictional Statement filed by the City of Manassas, Virginia and Arthur L. Shoemake, Commissioner of Revenue of the City of Manassas; and William H. Forst, State Tax Commissioner of the Commonwealth of Virginia. Authority for filing of the brief is found explicitly at Supreme Court Rules 36.1 and 36.4.

INTEREST OF THE STATE OF TENNESSEE

This case concerns the basic design of our federal system of government and the relationship of the states to federal authority. It involves the rights of the State of Tennessee, its governmental subdivisions and its citizens within that framework. Specifically, this case addresses the context within which the State of Virginia, and any other state, may tax an independent private contractor's beneficial use of federal property for its own profit-making ventures.

The State of Tennessee has a vital interest in the outcome of this case since it recently enacted legislation enabling its governmental subdivisions to tax a user of federal property when that use is for other than an exclusively public purpose and the user is not an agent or instrumentality of the United States. This legislation, which was enacted into law on April 17, 1987, amended T.C.A. § 67-5-203 by adding a new subsection (c). Section 67-5-203 now reads as follows (the amended provision has been italicized):

> 67-5-203. Government Property.—(a)(1) All property of the United States, all property of the State of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county, or municipal purposes shall be exempt from taxation.
>
> . . .
>
> (c) *All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This*

subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209.

T.C.A. § 67-5-203(c) is an integral part of the entire Tennessee tax system. Its design is to place the United States and its contractors in exactly the same position as state and local governments and their contractors, and as charitable, scientific, religious and educational organizations and users of their property. The revenue laws of Tennessee exempt from taxation property of governmental units and charities, scientific, religious and educational organizations which is used *exclusively* for the purpose for which those entities exist. T.C.A. § 67-5-203(a)(1); T.C.A. § 67-5-212(a)(1). These statutes thus subject to taxation property of governmental units and charities, scientific, religious and educational organizations which is *not* used exclusively for the purpose for which those entities exist, and these statutes have been so interpreted by Tennessee Courts. For instance, in construing the predecessor to T.C.A. § 67-5-203(a)(1), Chief Justice Green of the Tennessee Supreme Court specifically stated that the "exemption is determined not by the nature of the State's title to the property but by the use of the property." *State v. City of Nashville*, 178 Tenn. 344, 157 S.W.2d 839, 842 (1941). One narrow exception to these provisions of the Tennessee revenue laws is created for property owned by educational institutions controlled by the State of Tennessee, which is exempt from taxation regardless of whether it is used for an exclusively public purpose pursuant to T.C.A. § 67-5-203(a)(2). Copies of these statutory provisions are reproduced in the Appendix attached hereto.

Thus, while Tennessee may and has removed the exemption for either a State or local government unit or

charitable institution if their property is used for a non-exempt purpose, the State of Tennessee could not remove the absolute immunity of property of the United States from taxation. Tennessee could, however, accommodate for this inability by taxing a private corporation's use of the United States' property when that use is "for other than an exclusively public purpose." Tennessee accomplished exactly this by its enactment of T.C.A. § 67-5-203(c).

In June 1986, pursuant to T.C.A. § 67-5-203(c), Hawkins County, Tennessee imposed a tax on the private contractor Holston Defense Corporation's use of federal property located at the Holston Army Ammunition Plant. The United States of America subsequently filed a Complaint in the United States District Court for Eastern Tennessee, Northeastern Division, on June 30, 1986 seeking (1) a declaratory judgment that T.C.A. § 67-5-203(c) is invalid under the Tennessee and United States Constitutions and (2) a permanent injunction to preclude the Defendants, Hawkins County, Tennessee and its various officials, from taking any further steps to impose a tax upon Holston Defense Corporation pursuant to T.C.A. § 67-5-203(c). The District Court granted the United States' Motion for Summary Judgment in a Final Judgment and Memorandum and Order, both entered on April 10, 1987. The District Court specifically held that the taxpayer Holston Defense Corporation was so closely interrelated with the United States that the imposition of a tax on Holston pursuant to T.C.A. § 67-5-203(c) was in reality a tax on the property itself and, as such, barred by the Supremacy Clause of the United States Constitution (art. VI, cl. 2). Both Hawkins County, Tennessee and the State of Tennessee, which

had intervened as a party defendant in this case, have appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit, and that appeal is presently pending before that Court.

Similarly, Anderson County and Roane County, Tennessee assessed a "use tax" pursuant to T.C.A. § 67-5-203(c) against three private federal contractors using federal property at the United States Department of Energy's Oak Ridge facility. These private contractors were Martin Marietta Energy Systems, Inc., Oak Ridge Associated Universities, Inc. and Rust Engineering Company. The United States subsequently filed a Complaint on June 27, 1986 in the United States District Court for the Eastern District of Tennessee, Northern Division, seeking (1) a declaratory judgment that T.C.A. § 67-5-203(c) is invalid under the Tennessee and United States Constitutions and (2) a permanent injunction to preclude the Defendants, including Anderson County, Roane County and their various officials, from taking any further steps to impose a tax upon the aforementioned three private contractors pursuant to T.C.A. § 67-5-203(c). The State of Tennessee has been allowed to intervene in this action as a party defendant, and the case is presently pending before the United States District Court.

In each of the aforementioned two cases, the United States has raised the issue whether T.C.A. § 67-5-203(c) discriminates against the United States or its private contractors contrary to the Supremacy Clause of the United States Constitution (art. VI, cl. 2). That issue is presently before both the Sixth Circuit Court of Appeals in the *Hawkins County* case and the United States District Court

for the Eastern District of Tennessee, Northern Division, in the *Roane County* case.

Consequently, Tennessee is intensely interested in the outcome of this litigation, since the United States Court of Appeals for the Fourth Circuit's treatment of the discrimination issue is apparently contrary to the Sixth Circuit Court of Appeals' decision in *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969) and thus creates uncertainty regarding the appropriate standard for determining whether a state tax discriminates against either the United States or those with whom it deals. Tennessee believes that review of this important principle by this Court would clarify this standard and resolve any apparent conflict between the Circuits on this issue.

———o———

STATEMENT

Tennessee respectfully maintains that this Court should note probable jurisdiction in this case to resolve any inconsistencies between the decisions of the Fourth Circuit and the Sixth Circuit Courts of Appeals, and to clarify an issue which significantly impacts the relationship of the states, including Virginia and Tennessee, to federal authority.

———o———

REASONS WHY THIS COURT SHOULD NOTE PROBABLE JURISDICTION

As recognized by the Appellants in their Jurisdictional Statement, it now should be beyond dispute that an independent contractor using federal property for its own profit-making ventures does not share the United States' immunity from state taxation under the Supremacy Clause of the United States Constitution (art. VI, cl. 2), and thus a state may tax such a contractor's beneficial use of federal property. Appellant's Jurisdictional Statement, p. 6. *See also Washington v. United States*, 460 U.S. 536, 540, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983); *United States v. New Mexico*, 455 U.S. 720, 733-744, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982); *United States v. County of Fresno*, 429 U.S. 452, 462, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977).

As this Court reasoned in *United States v. New Mexico*, federal immunity exists "in *only one circumstance*: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico*, 455 U.S. at 735. (Emphasis added). This Court observed that this "narrow approach to governmental tax immunity" gives a "full range to each sovereign's taxing authority", and avoids "some of the manipulation and wooden formalism that occasionally have marked tax litigation—and that have no proper place in determining the allocation of power between coexisting sovereignties." *United States v. New Mexico*, 455 U.S. at 735-737. Thus, this Court recognized that a federal contractor's use of United States'

property in connection with commercial activities carried on for a profit constitutes "a separate and distinct taxable activity." *United States v. New Mexico*, 455 U.S. at 734-735, *quoting United States v. Boyd*, 378 U.S. 39, 44, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964).

In response to this Court's opinions on this subject, states including Tennessee and Virginia have sought to enact legislation to tax a private contractor's beneficial use of property provided to it by the United States government. Both T.C.A. § 67-5-203(c) and § 58.1-3502 (formerly § 58-831.2) of the Code of Virginia constitute such legislation.

The question presented to this Court, and currently pending before the United States Court of Appeals for the Sixth Circuit in the *Hawkins County* case and the United States District Court for the Eastern District of Tennessee, Northern Division, in the *Roane County* case, is what standard should be utilized to determine if any such state legislation discriminates against the United States or its private contractors in violation of the Supremacy Clause of the United States Constitution. The determination whether a tax is discriminatory requires "an examination of the whole tax structure of the state." *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 383, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960), *quoting Tradesmens' National Bank v. Oklahoma Tax Commission*, 309 U.S. 560, 568, 60 S.Ct. 688, 84 L.Ed. 947 (1940). A State's system of taxation does not discriminate against the United States and those with whom it deals "unless it treats someone better than it treats them." *Washington v. United States*, 460 U.S. at 544-545.

Nonetheless, even if discrimination exists, it may be justified under certain circumstances. For instance, as pointed out in the Appellants' Jurisdictional Statement at p. 8, the Sixth Circuit Court of Appeals in *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969), approved a Michigan taxing scheme which created an exemption in favor of state-supported educational institutions on the grounds that the exemption was conducive to the welfare of the general public. Specifically, the Sixth Circuit noted that the exemption for state-supported educational institutions was founded upon the well-recognized policy of both the United States and individual states "to protect, promote and support education, including colleges and universities." *Chrysler Corporation v. Township of Sterling*, 410 F.2d at 70. The Sixth Circuit in reaching this conclusion relied upon this Court's decision in *Phillips Chemical*, and reasoned that the controlling criteria in assessing the validity of the state's taxing scheme was whether the discrimination created by the exemption in favor of state-supported educational institutions "can be justified." *Chrysler Corporation v. Township of Sterling*, 410 F.2d at 68.

The Fourth Circuit Court of Appeals, in striking down the Virginia taxing statute as violative of the United States Constitution, refused to follow the Sixth Circuit's analysis in *Sterling* and instead reasoned that discrimination was always invalid assuming the users of state and federal property were "similarly situated". *United States v. City of Manassas*, 830 F.2d 530, 534 (4th Cir. 1987). Thus, as stated in the Jurisdictional Statement of the Appellants at page 8, the Fourth Circuit in essence held that a tax which treats some state contractors differently than

federal contractors could never be justified on any grounds.

CONCLUSION

The State of Tennessee accordingly submits the Court should note probable jurisdiction and set this case for argument on its merits. The federal question presented not only affects the validity of Virginia's revenue statute but also impacts upon similar statutes in other states, including Tennessee. Furthermore, the Fourth Circuit's Opinion is in conflict with the Sixth Circuit and thereby creates confusion under what circumstances, if any, a state may justify a discriminatory tax on public policy grounds.

Respectfully submitted,

W. J. Michael Cody
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APPENDIX

67-5-203. *Government property.*—(a)(1) All property of the United States, all property of the state of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county or municipal purposes shall be exempt from taxation; provided, however, that real property purchased for investment purposes by the Tennessee consolidated retirement system shall be subject to property taxation.

(2) All property of any educational institution owned, operated, or otherwise controlled by the state of Tennessee as trustee or otherwise, shall be exempt from taxation.

(b)(1) When all of the area which is assessed as a single unit by the assessor of property of any political subdivision is acquired in its entirety by the United States government, the state of Tennessee, or any agency or political subdivision thereof, any lien for property taxes assessed by the political subdivision for the year in which the property is so acquired shall be released on the approval of the assessor of property of the political subdivision assessing such taxes with respect to that portion of the taxes representing the remainder of the calendar year after the date of the instrument or conveyance by the property owner, or after the date of the entry of an order of possession if the property is acquired by condemnation and the property owner shall be relieved of all personal liability for the portion of the taxes.

(2) Either the condemnor or the property owner may request the assessor to provide such proration which

shall be based on the last made assessment and rate fixed, according to law, and the trustee shall accept tender of the amount determined to be owing.

(3) Where only a portion of the entire unit assessed for taxes by the assessor of property of a political subdivision is so acquired, the portion of the taxes for the entire year attributable to the part taken, where same is acquired by deed, shall be arrived at by dividing an amount equal to the assessed valuation of the portion taken, as agreed upon between the property owner and the assessor of property, by the present assessed valuation of the entire assessed unit and multiplying the resulting quotient against the amount of the whole tax assessed against the entire unit for the full year after which the portion of the property so acquired shall be relieved of the lien of the portion of the taxes for the remainder of the calendar year as provided in subdivision (1) of this subsection, and the property owner shall be relieved of all personal liability as to the portion of the taxes as provided in subdivision (1) of this subsection; provided further that where the portion of the property is being acquired by condemnation the court will determine the portion of the entire year's taxes attributable to the part taken after hearing proof on behalf of the property owner and the taxing authorities, with the burden being on the taxing authorities to assure their proper appearance before the court.

(4) In the event of such an acquisition by deed, either the condemnor or the property owner may request the assessor to provide such proration, after the assessor has agreed with the property owner relative to the assessed

valuation of the portion taken; and under either circumstances set forth in subdivision (3) of this subsection, the proration shall be based on the last made assessment and rate fixed, according to law, and the trustee shall accept tender of the amount determined to be owing.

(c) All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. The provisions of this subsection shall only apply to any county having a population in excess of forty-three thousand (43,000) according to the 1980 federal census or any subsequent federal census.

(d) Notwithstanding any provision hereof to the contrary, subsection (c) shall apply to any county having a population in excess of twenty-eight thousand (28,000) and less than twenty-eight thousand five hundred (28,500) according to the 1980 federal census or any subsequent federal census. [Acts 1973, ch. 226, § 5; 1976, ch. 449, §§ 1, 2; T.C.A., §§ 67-404, 67-501; Acts 1986, ch. 856, §§ 1, 2; 1987, ch. 48, § 1; 1987, ch. 54, § 18.]

67-5-212. *Religious, charitable, scientific, educational institutions.*—(a)(1) There shall be exempt from property taxation the real and personal property, or any part thereof, owned by any religious, charitable, scientific or nonprofit educational institution which is occupied and

used by such institution or its officers purely and exclusively for carrying out thereupon one or more of the purposes for which the institution was created or exists or which is occupied and used by another exempt institution purely and exclusively for one or more of the purposes for which it was created or exists under an arrangement whereunder the owning institution receives no more rent than one dollar ($1.00) per year; provided, however, that the owning institution may receive a reasonable service and maintenance fee for such use of the property; and provided further that no church shall be granted an exemption on more than one (1) parsonage which shall include not more than three (3) acres of land except as hereinafter provided; and provided further, that no property shall be totally exempted, nor shall any portion thereof be pro rata exempted unless such property or portion thereof is actually used purely and exclusively for religious, charitable, scientific or educational purposes. For the purposes of this section, a church parsonage shall be deemed to be property used purely and exclusively for religious purposes; provided, however, that no church shall be granted an exemption on more than one (1) parsonage.

(2) In determining the exemption applicable to a post-secondary educational institution, there shall be a presumption that the entire original campus of an institution chartered before 1930 is an historical and integral entity, and is exempt so long as no particular portion of such campus is used for nonexempt purposes.

(3) If real property of a religious institution which is tax exempt under subdivision (1) of this subsection is in whole or in part:

(A) Acquired under the power of eminent domain;

(B) Planned to be acquired under the power of eminent domain; or

(C) Under negotiation to be acquired under the power of eminent domain; the exemptions from property tax granted under that sentence shall apply to property purchased by the religious institution to replace the property condemned or to be condemned. If the property purchased as a replacement is used for nonexempt purposes, the property shall not be tax exempt. If property purchased as a replacement is not used for religious purposes but is subsequently sold, taxes shall then be due and payable on the property for such time as the property was owned by the religious institution, but no penalties shall apply to the religious institution for late payment of property tax on such property. This subdivision (a)(3) shall lapse and no longer be effective one (1) year after the completion of the Appalachian highway program.

(4) But the property of such institution shall not be exempt if the owner, or any stockholder, officer, member or employee of such institution shall receive or may be lawfully entitled to receive any pecuniary profit from the operations of that property in competition with like property owned by others which is not exempt, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly religious, charitable, scientific or educational purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such institution, or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one (1) or more of

these purposes. The real property of any such institution not so used exclusively for carrying out thereupon one (1) or more of such purposes, but leased or otherwise used for other purposes, whether the income received therefrom be used for one (1) or more of such purposes or not, shall not be exempt; but if a portion only of any lot or building of any such institution is used purely and exclusively for carrying out thereupon one (1) or more of such purposes of such institution, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining or other portion, shall be subject to taxation.

(b)(1) All such institutions so claiming exemption under this section shall be required to make application for such exemption to the assessor of property upon a proper form prepared by the state board of equalization and supplied by the assessor of property, and the completed form shall show ownership, estimated value, description and location of property, the purposes for which the property is used, and such other information as may be required by either the state board of equalization or the local assessor of property. No exemption shall be granted unless and until the same is approved in writing and signed by the executive secretary or staff attorney of the state board of equalization or such other person as may be designated by the state board of equalization. The assessor of property shall maintain on file all applications which are approved for exemption.

(2) Upon approval for exemption from property taxation it is not necessary that the institution owning such property make application for such exemption each year;

provided, however, that such institutions promptly report to the assessor of property any change in the use of such property which affects the exempt status.

(3) All institutions claiming an exemption under this section which have not previously filed an application for and been granted an exemption for a parcel must file an application for exemption with the state board of equalization by May 20 of the year for which exemption is sought. If the application is approved, the exemption will be effective as of January 1 of the year of application or as of the date the exempt use of such parcel began, whichever is later. If application is made after May 20 of the year for which exemption is sought, but prior to the end of the year, the application may be approved but will be effective for only a portion of the year determined as follows:

(A) If application is filed within thirty (30) days after the exempt use of the property began, exemption will be effective as of the date the exempt use began or May 20, whichever is later;

(B) If application is filed more than thirty (30) days after the exempt use began, the exemption will be effective as of the date of application.

(4) The property of any such institution failing to file the application or the property of any such institution filing an application, but failing to qualify for exemption, shall not be exempt from property taxation but shall be assessed and taxed as other similar property; provided that any institution failing to file the application on or before April 1, 1975 shall have the right to an appeal before the state board of equalization upon the filing with

the executive secretary of the state board the proper form and application for such exemption. All questions of exemption under this section shall be subject to review and final determination by the state board of equalization, provided that any determination by the state board of equalization is subject to judicial review by petition of certiorari to the appropriate chancery court. All other provisions of law notwithstanding, no property shall be entitled to judicial review of its status under this statute except as provided by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and only after the exhaustion of administrative remedies as provided hereinabove.

(c) As used hereinabove, "charitable institution" shall include any non-profit organization or association devoting its efforts and property, or any portion thereof, exclusively to the improvement of human rights and/or conditions in the community.

(d)(1) The property, or any part thereof, owned by any religious, charitable, scientific or educational membership nonprofit organization shall not be denied exemption because administrative, social or recreational activities of such organization are conducted thereon, where the activities are agencies for the advancement and enlargement of the purposes for which the organization exist; where such activities are in furtherance of the general purposes of such organization; or where the activities promote the interest of its membership in such organizations.

(2) When property is owned by corporations organized for the exclusive purpose of holding title to property for use of any organization which itself qualifies for such exemption from taxation under this subsection, only such

property or such parts thereof, of the corporation as would be entitled to an exemption under this subsection if owned directly by such organization shall not be denied exemptions.

(3) The exemption of property or parts thereof under this subsection shall be applicable only to such part of the property on which such organization conducts administrative, social or recreational activities if it is less than the entire property.

(4) This subsection (d) shall apply only to those religious, charitable or educational membership nonprofit organizations which are chartered by the United States Congress.

(e)(1) There shall be exempt from property taxation the property of labor organizations exempted from the payment of federal income taxes by the United States Internal Revenue Law (26 U.S.C. § 501(c)(5)), when such property is not used for revenue producing profit, but is used by such organization for charitable or educational meetings, but if part of the property is used for revenue producing profit, then the part so used shall not be exempt from property taxation; provided, however, that the real property on which the building is situated shall be exempt from property taxation.

(2) Provided however, no such organization which discriminates against any person based upon race, sex, religious beliefs or national origin shall be eligible for the property tax exemption authorized by this subsection.

(f) There shall be exempt from property taxation the property or, any part thereof of nonprofit artificial

breeding associations chartered under the provisions of part 6 of chapter 1 of title 48 and of fraternal organizations exempted from the payment of federal income taxes by the United States Internal Revenue Law (26 U.S.C. § 501(c)), when such property or part thereof is not used for revenue producing profit, but used solely by such organizations for meetings, administrative, scientific, charitable, or educational purposes.

(g)(1) In the case of property that is owned by any religious, charitable, scientific or educational institution and on which such institution constructs improvements to be occupied and used by such institution or its officers purely and exclusively for carrying out thereupon one (1) or more of the purposes for which the institution was created or exists, the property to the extent of the value of the improvements constructed thereon for these purposes shall be considered to be occupied and used by the institution or its officers purely and exclusively for the institution's purposes from and after, but not before, the commencement of the construction of the improvements and to the extent of such value shall be exempt from taxation; provided, however, that if the improvements upon completion are not so occupied and used, then no part of the value of the property shall be exempt from taxation during the construction of the improvements.

(2) If upon completion of the improvements a portion thereof is not so used and occupied, such portion shall not be exempt from taxation during construction.

(3) If the improvements upon completion are not occupied and used by such institution or its officers for a period of ten (10) years, purely and exclusively for car-

rying out thereupon one or more of the purposes for which such institution was created or exists, the institution shall be liable for the full amount of property taxes that would otherwise have been due and payable during the period of construction, plus penalties and interest as provided in this title.

(4) Provided, however, that construction begun, and having the effect of activating the provisions of this subsection (g), shall be completed within five (5) years or the effect of this subsection shall be null and void.

(h)(1) There shall be a percentage basis used for the purpose of exempting from taxation the property of fraternal organizations exempted from the payment of federal income taxes by the United States Internal Revenue Law (26 U.S.C. § 501(c)).

(2) The percentage amount and time use of the property used directly, physically, and exclusively for religious, charitable, scientific, literary and educational activities or activities necessarily incidental thereto shall be exempt from the total property taxation.

(3) The percentage of the total amount of the property to be exempt from property taxation shall be determined by the local assessor of property subject to existing law.

(i) There shall be exempt from property taxation the property, or any part thereof, of nonprofit county fair associations.

(j) There shall be exempt from property taxation the property or any portion thereof containing one (1) residential dwelling located in a community park which is open to entry by the general public if such dwelling is

owned by a nonprofit religious, charitable, educational or scientific organization which does not receive income from the resident thereof, if such resident does not occupy the dwelling in lieu of a salary, and if such resident by his presence would discourage or prohibit damage or destruction by vandalism of the organization's property.

(k) There shall be exempt from property taxation any property upon which a caretaker's dwelling is located if:

(1) The dwelling is located upon land owned by a nonprofit member organization chartered by the United States Congress;

(2) The land immediately surrounding the dwelling is used by such organization for nonprofit religious, charitable, educational or scientific purposes; and

(3) The caretaker's presence is required for the physical security of the users of the property as well as to discourage or prohibit damage or destruction by vandalism of the organization's property. [Acts 1973, ch. 226, § 5; 1974 (Adj. S.), ch. 771, §§ 5-7; 1974 (Adj. S.), ch. 774, §§ 1, 2; 1975, ch. 322, § 1; 1976 (Adj. S.), ch. 670, §§ 1, 2; 1976 (Adj. S.), ch. 849, § 1; 1977, ch. 255, §§1, 2; 1977, ch. 421, §§ 1-5; 1979, ch. 22, § 1; 1981, ch. 96, § 1; 1981, ch. 218, § 1; 1981, ch. 306, §§ 1, 2; 1982 (Adj. S.), ch. 713, § 1; 1983, ch. 460, § 1; T.C.A., § 67-513; Acts 1984, ch. 507, § 1; 1984, ch. 651, § 1; 1984, ch. 749, § 1; 1984, ch. 766, § 1; 1984, ch. 809, § 1; 1984, ch. 832, § 4; 1985, ch. 68, § 1.]

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No. 87-1117

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF MANASSAS, VIRGINIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Section 58.1-3502 of the Virginia Code Annotated (1984) unconstitutionally discriminates against the United States by requiring contractors to pay local personal property tax on federally-owned property that they use in performing their government contracts, while exempting from the tax property owned by certain Virginia governmental bodies that is similarly used by contractors.

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MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the United States Court of Appeals for the Fourth Circuit in this case be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A1-A11) is reported at 830 F.2d 530. The opinion of the district court (J.S. App. A13-A21) is reported at 627 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1987. The notice of appeal was filed on December 23, 1987 (J.S. App. A22-A23), and the appeal was docketed on January 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1. Since 1981, the United States Defense Logistics Agency has supervised approximately 29 Defense Department contracts that the Federal Systems Division of International Business Machines Corporation (IBM) has performed at its facility in Manassas, Virginia. These contracts primarily involve services performed for the Navy in research and development, design, assembly, and testing of signal processing and submarine sonar systems. Pursuant to these contracts, the United States provides IBM with government property, including machinery and tools, for use in performance of these government contracts but not for use in performance of nonfederal contracts or for its own account. The United States pays IBM a fee for these services, which constitutes IBM's profit on the contracts. The United States pays all expenses incurred in IBM's performance of the services. J.S. App. A2.

On June 23, 1981, the City of Manassas informed IBM that it was subject to personal property tax with respect to the property furnished to it by the United States for use in performing its federal service contracts. The Virginia statute, now codified at Section 58.1-3502 of the Virginia Code Annotated (1984), provides that a company that leases or borrows personal property from a governmental body is liable for local taxation as if it were the owner of the property.[1] The statute expressly exempts from its pro-

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[1] Section 58.1-3502 provides:

> Any person, firm, association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the

visions property owned by the Virginia Port Authority or by certain local transportation districts.[2] Under protest, IBM paid the personal property taxes demanded by the City of Manassas for the years 1981-1984, which totalled $290,365. Pursuant to its "cost-plus" contract arrangement, the United States reimbursed IBM for the tax payments. J.S. App. A3.

2. The United States then instituted this action in the United States District Court for the Eastern District of Virginia. The complaint sought a declaratory judgment that the Virginia statute is unconstitutional because it discriminates against the United States, a refund of the taxes paid, and injunctive relief (see J.S. App. A13). The district court granted summary judgment in favor of appellants (*id.* at A13-A21). The district court recognized that the statute is "discriminatory on its face" (*id.* at A17) in exempting property furnished to contractors by the Virginia Port Authority or local transportation districts from the tax burden placed on property furnished by the United States. But the court held that this discrimination

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same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (§ 15.1-1342 et seq.) and leased to provide transportation services.

[2] Prior to July 1, 1980, the statute had applied only to property *leased* from the government (Va. Code Ann. § 58-831.2 (1950)); it was amended in 1980 to subject to taxation also property borrowed from the government. Although the language of the exemptions continues to refer to property "leased" from the Port Authority and the transportation districts, it is not disputed that the local taxing authorities, consistent with the clear legislative intent of the amendment, also apply the exemptions to property borrowed from or otherwise made available by the exempted Virginia governmental bodies.

is "justified" because the Port Authority and transportation districts both involve areas "of vital concern to the Federal Government as well as the state" (*ibid.*).

The court of appeals reversed (J.S. App. A1-A11). Relying on *Phillips Chem. Co.* v. *Dumas Indep. School Dist.*, 361 U.S. 376 (1960), the court explained that a state is not free to impose a use tax that discriminates against the federal government. The court found that here "the discrimination against the federal government in favor of subdivisions of the state government is obvious," and it rejected the district court's conclusion that that discrimination could be justified because the affected state instrumentalities are involved in areas assertedly of "vital concern" to the United States (J.S. App. A6). The court explained that facially discriminatory treatment cannot be justified by examining the relative strength of the interests at stake. Rather, it can be justified only by "a showing that the two classes of users, from federal and state sources, are not similarly situated, so that in essence there is no discrimination" (*id.* at A9). The court concluded that no such justification had been offered to support the facially discriminatory treatment in the statute, and therefore the statute is unconstitutional (*id.* at A10-A11).

ARGUMENT

The court of appeals correctly concluded that the Virginia statute is unconstitutional because it discriminates against the United States. It is well settled that a tax is invalid, even if it is not imposed directly upon the United States, " 'if it operates so as to discriminate against the Government or those with whom it deals.' " *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751 (1961) (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)). Clearly, the burden of the local per-

sonal property tax involved here falls upon the United States, in that the cost-plus contract arrangement obliges the government to reimburse IBM for its tax liability. And there can be little doubt that Va. Code Ann. § 58.1-3502 (1984) operates in a discriminatory fashion in imposing the tax upon property owned by the United States, but not imposing it in similar circumstances upon property owned by certain Virginia state instrumentalities. The court of appeals found that "the discrimination against the federal government in favor of subdivisions of the state government is obvious" (J.S. App. A6), and appellants do not take issue with this conclusion. Even the district court recognized that the statute is "discriminatory on its face" (*id.* at A17). Thus, the decision below is soundly based on principles well established by this Court.

Appellants' defense of the Virginia statute is not spelled out in detail, but it appears to be the ground relied upon by the district court—namely, that the discriminatory treatment in the statute is "justified" by certain policy considerations. Relying on a statement made by this Court in *Phillips Chem. Co.* v. *Dumas Indep. School Dist.*, 361 U.S. 376, 382 (1960), the district court held that the fact that the state instrumentalities favored by the statute are involved in areas of "vital concern" to the federal government justifies the discrimination by the State (J.S. App. A17-A18). This holding was correctly rejected by the court of appeals as based on a clear misinterpretation of *Phillips*.

The facts in *Phillips* were quite similar to those here. Texas law subjected persons leasing property from the federal government to the local ad valorem tax on that property, but it imposed a distinctly lesser burden on similarly situated lessees of property owned by the State. The Court stated (361 U.S. at 382): "The discrimination against the United States and its lessee seems apparent. The question, however, is whether it can be justified." The

Court then framed the relevant inquiry as whether the State has "single[d] out those who deal with the Government * * * for a tax burden not imposed on others similarly situated"; the disparate treatment "must be justified by significant differences between the two classes" (*id.* at 383). The Court rejected the justifications offered by the State—that the State could collect in rent what it lost in taxes from its own lessees, that the favoritism for state lessees advanced the State's interest by facilitating the leasing of its property and that the federal leasing was of greater magnitude—as "too impalpable to warrant" the disparate treatment (*id.* at 384, 387). The Court concluded that the State is required to "treat those who deal with the Government as well as it treats those with whom it deals itself" (*id.* at 385).

This Court's opinion in *Phillips* clearly indicates, as the court of appeals here correctly stated, that the only "justification" that would support a statute discriminating against the United States is "a showing that the two classes of users, from federal and state sources, are not similarly situated, so that in essence there is no discimination" (J.S. App. A9).[3] Appellants make no attempt to provide such a justification. They simply suggest that the exemptions for the state instrumentalities serve the "public good" or are

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[3] *United States* v. *Department of Revenue*, 202 F. Supp. 757 (N.D. Ill.), aff'd, 371 U.S. 21 (1962), which is cited by appellants (J.S. 8), is a case where a tax was upheld as nondiscriminatory because the two classes treated differently were found not to be similarly situated. The case involved a local occupation tax, levied upon sales, that applied to sales to all governments, but did not apply to certain classes of tax-exempt organizations. The court held that the fact that the governments could raise revenue by taxation, but the exempt organizations had to depend upon voluntary contributions, provided a reasonable basis for conferring a tax exemption on sellers to the exempt organizations that was not accorded to sellers to the governments. 202 F. Supp. at 759.

"conducive to the welfare of the general public" (J.S. 8), presumably because the Port Authority and transportation districts engage in projects that promote the general welfare. Quite apart from the fact that there is no basis for assuming that the federal projects subject to taxation are not at least equally beneficial to the public welfare, the policy considerations advanced by appellants and the district court simply fail as a matter of law to justify a statute that taxes the United States, or those with whom it deals, in a discriminatory fashion. The Constitution does not permit a state to further its own interests or policies by granting itself preferential tax treatment vis-a-vis the federal government (even if it believes that its policy goals are shared by the United States).[4]

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[4] The court of appeals found it unnecessary to reach two other possible grounds for invalidating the Virginia statute, even if the preference for state instrumentalities were found not to be unconstitutionally discriminatory. First, the Virginia taxation scheme does not tax users of property that is owned by tax-exempt organizations. Thus, the taxation scheme "treats someone else better than it treats" those who deal with the federal government. *Washington* v. *United States*, 460 U.S. 536, 544-545 (1983) (citation omitted). That is not permissible if the two classes are similarly situated.

Second, the federally-owned property here was made available to IBM only for use in performing its government contracts; the property could not be used for its own account or in performing nonfederal contracts. These limitations clearly made the value of any interest that IBM had in the property substantially less than the full ownership value of the property. Accordingly, the assessment of the personal property tax upon the full value of the federal property exceeded the maximum that could reasonably be viewed as being imposed on IBM's interest; rather, it was, at least in part, an unconstitutional tax on property of the United States. See *United States* v. *New Mexico*, 455 U.S. 720, 741 n.14 (1982); *United States* v. *County of Fresno*, 429 U.S. 452, 463 n.11 (1977); *United States* v. *County of Allegheny*, 322 U.S. 174, 186-187 (1944); *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd, 450 U.S. 901 (1981).

Appellants rely primarily on the Sixth Circuit's decision in *Chrysler Corp.* v. *Township of Sterling*, 410 F.2d 62 (1969). That case involved a Michigan statute that placed a tax on the private use of property, including property owned by the federal government, but exempted the use of property of state-supported educational institutions. A divided court of appeals upheld the tax. The court first stated that there was no discrimination as a practical matter against the United States because the amount of exempted property involved was "infinitesimal" by comparison to the total amount of tax-exempt real estate in the State (410 F.2d at 69-70). The court further concluded that whatever discrimination was involved in the statutory scheme was "justified" within the meaning of *Phillips* (*id.* at 73). The justification apparently relied upon by the court for the statutory classification was the "well recognized policy of both the United States and the State of Michigan to protect, promote and support education" (*id.* at 70) and the fact that the United States provided financial support to the exempted Michigan institutions (*id.* at 70-71).

Despite its different factual context, to the extent the *Township of Sterling* decision rests on the proposition that a tax statute that discriminates against the United States can be justified by reference to some state policy that is advanced by the preferential treatment, it is at odds with the decision below. As we have explained, however, that proposition completely misconstrues *Phillips* and was correctly rejected by the court below. We do not believe that the existence of the *Township of Sterling* decision presents a conflict in the circuits that merits review by this Court. *Township of Sterling* has never been followed by any other court (other than the district court in the present case). Moreover, in the period since *Township of Sterling* was decided this Court has had occasion to consider other cases

involving state taxation that burdens the federal government, and its more recent decisions should put to rest any possible suggestion that *Phillips* permits a discriminatory tax to be justified on the basis of an assertion that the preferred entities engage in activity that promotes the general welfare. For example, in *United States* v. *County of Fresno*, 429 U.S. 452, 462 (1977) (footnote omitted), the Court noted that a state tax on those who deal with the federal government is constitutional "so long as the tax is imposed equally on the other similarly situated constituents of the State." See also *Washington* v. *United States*, 460 U.S. 536, 544-545 (1983); *United States* v. *New Mexico*, 455 U.S. 720, 735 n.11 (1982). It is highly questionable whether the Sixth Circuit would continue to regard *Township of Sterling* as good authority in light of the more recent pronouncements of this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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